

## **Submission on Draft Proposals of the New South Wales Law Reform Commission Open Justice Review**

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Thank you for the opportunity to make a submission in response to the New South Wales Law Reform Commission's draft proposals on its open justice review.

### **Ableism and Open Justice**

Violence against people with disability is a matter of such national significance that there is currently a Royal Commission exploring all forms of violence, abuse, neglect and exploitation of people with disability. The Royal Commission is specifically considering restrictive practices as a form of violence. Restrictive practices are a form of violence that is only perpetrated against people with disability. Restrictive practices include non-consensual sterilisation, menstrual suppression, contraception and abortion.

Restrictive practices are a form of *legal* violence when authorised pursuant to courts and tribunals exercising the *parens patriae* jurisdiction. In the NSW context these forums are the NSW Supreme Court's Protective List, the Guardianship Division of the New South Wales Civil and Administrative Tribunal and the Mental Health Review Tribunal. The assumption that the *parens patriae* jurisdiction is protective of people with disability even when it is enabling non-consensual interventions (e.g, permanently removing their fertility, enabling indefinite detention) relies on ableist assumptions about people with disability. Because restrictive practices are lawful, restrictive practices are not recognised as unlawful assault and people with disability who are subjected to them are unable to access accountability or redress through criminal and civil justice systems.

Restrictive practices are perpetrated in closed, segregated and institutional settings away from public scrutiny, such as group homes and mental health facilities. Additionally, the prior legal authorisation of their perpetration takes place in judicial and tribunal settings that are similarly segregated and closed from the public. This is because of longstanding departures from common law principles of open justice in courts exercising the *parens patriae* jurisdiction and adoption of similar approaches in legislation regulating guardianship and mental health tribunals.

In order to prevent violence against people with disability, realise their human rights and achieve their equality in the justice system and society more broadly, it is vital that the NSWLRC recommend reforms (to the extent possible in the scope of its project) to ensure hearings, information, documentation and decisions of the NSW Supreme Court's Protective List, the Guardianship Division of the New South Wales

Civil and Administrative Tribunal and the Mental Health Review Tribunal are publicly accessible on an equal basis to other jurisdictions.

These points were developed in my earlier submission dated 24 February 2021.

### **The NSWLRC's Draft Proposals Do Not Unseat Ableism Through Open Justice**

The NSWLRC's draft proposals paper does not recognise the role of open justice principles in sustaining ableism and concealing legal violence against people with disability. Moreover, the NSWLRC does not make any draft proposals to change the law to enhance public transparency of judicial and tribunal decision-making on restrictive practices.

Indeed, the NSWLRC accepts the conventional framing of courts and tribunals exercising the *parens patriae* jurisdiction as protective of vulnerable individuals, rather than recognising how these forums instead expose people to violence. This is reflected in the NSWLRC's observation in the draft proposal paper that: 'Some types of proceedings involve sensitive and personal issues relating to a person's mental health or decision-making capacity. Departures from open justice are appropriate to protect the identity of people involved in such proceedings' (p 46).

Draft proposal 5.4 (p 47) on publishing information in mental health, guardianship or community welfare proceedings further entrenches the exclusion of people with disability from enjoying open justice in the mental health and guardianship proceedings. The draft proposal does not facilitate greater public access to information and decisions about restrictive practices.

The NSWLRC is encouraged in its final report to engage with the role of mental health and guardianship tribunals in legal violence against people with disability, and to make recommendations to enhance transparency, with similar safeguards of de-identification of party names and details as are utilised in other jurisdictions. Such an approach would support the growing momentum – as exemplified by the current Disability Royal Commission – to address all forms of violence against people with disability. Legal and justice systems cannot be effective in preventing and redressing violence as long as they remain complicit in its perpetration.